

Establishing and Collecting Restitution

Recommendations for Developing and Collecting a Victim's Economic losses

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What is Restitution?

- Ariz. Rev. Stat. Ann. §13-105(16). "Economic loss' means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense."
- Ariz. Rev. Stat. Ann. §13-403(C). Restitution order equals "... full amount of the economic loss as determined by the court and in the manner as determined by the court..." (emphasis added).
- Purpose of restitution to make victim whole. *State v. Howard*, 168 Ariz. 458, 459, 815 P2d 5, 6 (App. 1991)
- Mandatory Victim Restitution Act, 18 U.S.C. §3663A (MVRA) mandatory restitution "to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. §3664(f)(1)(A). Court must determine amount. 18 U.S.C. §3664
- Other States have similar definitions. See CAL. CONST. art. I, §28(b)(13); Cal. Penal Code §1202.4(f); OR. REV. STAT. ANN. §137.106

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Economic loss

- Future medical care costs and lost earning capacity. *State v. Howard*, 168 Ariz. 458, 460, 815 P2d 5, 7 (App. 1991) ("[E]conomic loss includes ... losses reasonably anticipated to be incurred in the future as a result of the defendant's actions.")
- Other costs incurred as a direct result of crime such as mileage to/from court, burial costs, property cleanup costs
- See Cal. Penal Code §1202.4(f)(3) ("To the extent possible, the restitution order ... shall be of a dollar amount that is sufficient to fully reimburse ... For every determined economic loss incurred...") (Property loss, medical expenses, mental health counseling, wages or lost profits, **non-economic losses** including but not limited to psychological harm for victims of certain child sexual assault cases, post-sentencing interest at ten percent, actual and reasonable attorney fees and other costs of collection, relocation costs, residential security costs, costs to retrofit a home or vehicle, credit monitoring)
- Victim attorney fees (to exercise victim rights but not to "prod" the state into filing charges). See *State v. Slater*, 220 Ariz. 239, 243, 204 P3d 1088, 1092 (App. 2009)

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Non-Economic Loss

- Pain and suffering. A.R.S. §13-105(16); *but see* Cal. Penal Code §1202.4(f)(3) (pain and suffering damages allowable for certain types of child sexual assault cases)
- Attorney fees to convince prosecutor to file charges or to help investigate or support charge (adjunct prosecutor). *State v. Sloner*, 220 Ariz. 239, 243, 204 P3d 1088, 1092 (App. 2009)
- Punitive damages (designed to punish not to make victim whole). A.R.S. §13-105(16)
- Consequential damages. *Id.* (indirect economic losses)
- Mandatory Victim Restitution Act limits. *See* 18 U.S.C. §3663A voluntarily incurred costs of a private investigation are not recoverable as "expenses incurred during participation in the investigation or prosecution of the offense." *See Lago v. United States*, 584 U.S. ___, ___ (2018).

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Setting up for success... manner of payment

- Court must determine amount of restitution. A.R.S. §13-603(C)
- Court must determine manner of payment. A.R.S. §13-804(E)
- Victim views shall be considered. A.R.S. §13-804(E)
- Restitution lien versus criminal restitution order (CRO)? A.R.S. §§13-805(B) (CRO), -806(A) (lien)
 - Pre-conviction restitution lien to preserve status quo if assets available? May be requested by victim or state. A.R.S. §13-806(C)
 - Restitution lien does not earn interest but preserves status quo; CRO earns ten percent interest annually. A.R.S. §13-805(E)
- Consider all assets and income including worker's compensation benefits and social security benefits. *Id.*; *but see* 42 U.S.C. §407(a) (social security benefits shall not "be subject to execution, levy, attachment, garnishment, or other legal process") (emphasis added); *In re Lampert*, 306 Mich. App. 226, 234, 856 N.W.2d 192, 200 (2014)
- Court may conduct a hearing on the manner of payment. A.R.S. §13-804(G)
- Victim disagrees with the manner of payment? May file a petition at any time to change the manner of payment. A.R.S. §13-804(M)

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Collecting restitution

- Defendant incarcerated? Arizona Department of Corrections shall withdraw between 20-50% of a prisoner's spendable account balance for payment of restitution and to comply with the manner of payment ordered. A.R.S. §31-250(A) & (C)
- Defendant on probation? Work with probation department to ensure compliance with manner of payment ordered
- Federal law, *see* 18 U.S.C. §3664(m)(1)(B) (At the request of a victim ... the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing or indexing such abstract ... the abstract of judgment shall be a lien on the property of the defendant ... in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.")
- Enforcement as a civil judgment. *See* TEX. CRIM. P. CODE ANN. § 42.037(m) ("An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.")
- Tax intercepts. *See* M.D. CODE ANN., CRIM P. §11-616; MONT. CODE ANN. §46-18-244(7) ("If full restitution has not been paid, the department of revenue shall ... intercept any state tax refunds and any federal tax refunds, as provided by law, due the offender and transfer the money ... For disbursement to the victim.")

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Defendants on probation

- Probation officer shall notify court when defendant has not paid restitution for a minimum of four months. A.R.S. §13-804(N).
- • State shall include reasons for non-payment, expected duration of non-payment, and recommendations for further action if any. *Id.*
 - Department must provide notice to the victim and state (if victim has requested notice). *Id.* If victim or state objects to probation recommendations, either can request a hearing.
 - Court must hold a review hearing if requested or on its own to evaluate probation department findings and recommendations. A.R.S. §13-804(O).
- Victim may still file a Petition for Order to Show Cause re civil contempt and request that probation officer serve defendant at a separate meeting with defendant; remedy of incarceration with a purge order, probation revocation, garnishment order or levy or community restitution. A.R.S. §13-810(J)
- • Willful non-payment? A.R.S. §13-810(I)
 - Intentional refusal to make good faith effort to obtain monies required to make payment? A.R.S. §13-810(I)
- Can victim take discovery? Compare A.R.S. §13-810(A) ("In addition to any other remedy provided by law including a writ of execution or other civil enforcement...") with A.R.S. §13-810(I) ("In any hearing...a person entitled to restitution may examine the defendant under oath concerning the defendant's financial condition, employment and assets or on any other matter relating to the defendant's ability to pay restitution,"); or also A.R.S. §13-804(E) ("The court shall make all reasonable efforts... The court may enter any reasonable order necessary...").
- If not willful or intentional refusal to make good faith efforts, modify manner of payment, take other steps to ensure payment or allow levy or garnishment. A.R.S. §13-810(I)-(I)-(5)

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Defendants off probation

- On discharge from probation or release from prison, criminal restitution order must issue if not done at sentencing. A.R.S. §13-805(C)(2)
- File criminal restitution order with county recorder (lien on real property), department of motor vehicles (lien on automobiles), and secretary of state (lien on personal property). A.R.S. §13-806(E) and (F)(1)-(3)
- Seek leave to serve interrogatories, requests for production, request for debtor's exam using criminal case number seeking information about income and expense. A.R.S. §13-804(E) (reasonable orders); A.R.S. §13-810(A) (contempt available "[i]n addition to any other remedy provided by law...").

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Discovery

- Income and assets
 - Employment
 - Family support
 - House (Is home equity subject to a homestead exemption?)
 - Cash value in insurance
- Expenses (does defendant prioritize cable TV, or smart phone service over restitution obligations?) ARIZ. CONST. Art 2, §2.1(A)(8) (crime victim has a right "[t]o receive **prompt** restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.") (emphasis added)
 - Basic obligations
 - Rent
 - Utilities (cell, cable)

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Enforcement options

- After receiving discovery, negotiate a payment plan with consequences for non-payment. Require judicial oversight, late fees for non-payment, regular employment and address updates, and waiver of service of process of an OSC petition in case of non-compliance
- Petition for order to show cause re contempt in same manner without probation department assistance. A.R.S. §13-810(B)
- Request a writ of criminal garnishment of earnings, property or non-earnings. A.R.S. §13-812(B)(1)-(6)

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Fair Debt Collection Practices Act Should not Apply to Restitution Collection Efforts

- Fair Debt Collection Practices Act prohibits certain practices used to collect "any obligation ... of a consumer to pay money arising out a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment." *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1167 (3rd Cir. 1987)
- Restitution obligations are not "debts" and instead can be considered damage obligations thrust upon a defendant as a result of criminal conduct. *See, e.g., Turner v. Cook*, 362 F.3d 1367, 1371 (9th Cir. 2004) (FDCPA inapplicable to collection efforts against a defendant arising out of a tort action).

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Civil Remedies

- Defendant estopped from challenging essential allegations of the criminal offense in a separate civil action. A.R.S. §13-807
 - Damages must exceed economic loss. Victim cannot recover economic losses twice as restitution and in a separate civil action. But victim can recover general damages, pain and suffering and punitive damages
 - Civil judgments are dischargeable in bankruptcy. Consider insurance coverage. Homeowners insurance? Auto insurance? Umbrella? Business or commercial liability? D&O or fiduciary duty claims?
- Restitution orders are non-dischargeable in bankruptcy. A.R.S. §13-805(I)

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Questions?

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• Thank you

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